IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.RAMACHANDRAN
&
THE HONOURABLE MR. JUSTICE A.K.BASHEER

FRIDAY, THE 19TH JANUARY 2007 / 29TH PAUSHA 1928

RFA.No. 552 of 2006()

AGAINST THE ORDER DATED 31/07/2006 IN IA.3253/98 IN
OS.170/1995 of II ADDL.SUB COURT,KOZHIKODE

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: APPELLANT/4TH RESPONDENT/4TH DEFENDANT:

K.P. RETNA SINGH, S/O. K.P.SOBHANA,
NAGARAM AMSOM, DESOM, KOZHIKODE TALUK.

BY ADV. SRI.P.A.AUGUSTINE(AREEKATTEL)

RESPONDENTS: PETITIONERS & RESPONDENTS 1 TO 4/PLNTF.& D1TO 3&5:

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1. KOOVIL PURAYIL NARAYANI,
W/O. K.P. KORUKUTTY, KATCHERI AMSOM, DESOM,
KOZHIKODE TALUK.

2. KOOVIL PURAYIL BHARATHAN,
S/O. K.P.KORUKUTTY, KATCHERI AMSOM, DESOM,
KOZHIKODE TALUK.

3. KOOVIL PURAYIL PRABHAKARAN,
S/O. K.P. KORUKUTTY, VALAYANAD AMSOM, DESOM,
KOZHIKODE TALUK.

4. K.P. SOBHANA,
D/O. KATTUKARAN AYAPUTTY, NAGARAM AMSOM, DESOM,
KOZHIKODE TALUK.

5. K.P. TESSY, D/O.K.P.SOBHANA,
NAGARAM AMSOM, DESOM, KOZHIKODE TALUK.

6. K.P. BHAGAWAL SINGH, S/O.K.P.SOBHANA,
NAGARAM AMSOM, DESOM, KOZHIKODE TALUK.

BY

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 30/11/2006,, THE COURT ON 19.1.2007 PASSED THE FOLLOWING:

M. RAMACHANDRAN & A.K. BASHEER, JJ.

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R.F.A.NO.552 OF 2006

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DATED THIS THE 19th DAY OF JANUARY, 2007.

JUDGMENT

Basheer, J.

This appeal which is at the instance of defendant No.4 in a suit for partition, is directed against the order passed by the court below in the final decree proceedings in that suit. It is contended by the appellant that the court below has passed the final decree in total variance of the clauses contained in the preliminary decree.

2. It is not in dispute that the trial court had passed the preliminary decree by judgment dated December 12, 1997 directing division of the plaint schedule properties into 7 equal shares and allotting 2/7 shares to the plaintiffs. Though it was found that defendants 1 to 5 were entitled to 1/7 share each, separate allotment of their share was not ordered since they had not paid separate court fee for such allotment. The preliminary decree further directed that the plaintiffs would be entitled to claim mesne profits from defendants 2 to 5.

3. In the final decree proceedings, an advocate commissioner was appointed to effect partition in terms of the preliminary decree. The Advocate Commissioner, on measurement, found that the plaint schedule property had an extent of 5.23 cents. The remaining portion of the land had been acquired for widening the road years ago. It was also found that there was a well in the

property which was in disuse. The Advocate Commissioner further found that a commercial building had been constructed in the property with its ground floor set apart for parking vehicles. The first floor comprised of six shop rooms. The Commissioner reported that division of the land by metes and bounds was impossible since the two storied commercial building occupied the entire land. Accordingly, the Commissioner effected partition allotting the six shop rooms among the six out of seven sharers. As far as the other sharer was concerned, it was provided in the report that he be paid the value of his share in cash by the other sharers.

4. It appears that some of the sharers had raised an objection that the land had not been properly valued. The report of the Commissioner was therefore remitted in the light of the above objection. In the meanwhile, the Advocate Commissioner who had prepared the re0port, had left the profession and joined some other service. Therefore, another Advocate Commissioner was deputed. She filed her report taking note of the objections raised by the parties. Thereafter, no objections were raised by any of the sharers to the report submitted by the Advocate Commissioner.

5. The court below had passed final orders in the application for passing of final decree after hearing the parties. Two shop rooms (plots 2 and 3) as indicated in Ext.C1(a) plan No.1 were allotted to the plaintiffs/petitioners. Plot No.1 in Ext.C1 (a) plan was allotted to the share of respondent No.3. Plot No.4

in Ext.C1(a) plan was allotted to respondent No.4. Similarly, plot No.5 was allotted to respondent No.5. The parking area in the ground floor was ordered to be left in common for the proper enjoyment of the shop rooms allotted to the sharers. The owelty amounts payable by the different sharers were also quantified in the order.

6. The primary contention raised by the appellant is that the court below was not justified in effecting partition of the commercial building among the sharers since such a building was conspicuously absent from the description in the plaint schedule in the preliminary decree. The other contention is that the land available in the property has not been divided among the sharers equitably. There is yet another grievance that the well available in the property is not seen allotted to any of the sharers. We are afraid, the above contentions raised by the appellant are totally untenable and misconceived. Appellant does not have a case that the commercial building in question with the ground floor parking area, is not situated in the plaint schedule property which is the subject matter of the preliminary decree, nor has raised any contention based on mistaken identity. The Advocate Commissioner had reported that the land could not be divided among the sharers by metes and bounds since the commercial building occupied the land almost entirely. We have carefully perused the Report, share list, plans, valuation account, etc. submitted by the Commissioner. The Report shows that the property was inspected by the Commissioner in the presence of 2nd plaintiff and

representative of defendant No.1 and also defendant No.5 who reportedly represented defendant No.3 and the appellant herein. The Commissioner had also reported that the well was not being used since it was full of waste materials.

7. Admittedly, the appellant had not raised any objection before the court below regarding the division of the building available in the schedule property. It was noticed by the court below that the only grievance of the parties was regarding the valuation of the land. It was therefore that the report of the Commissioner was remitted back. The Advocate Commissioner who was subsequently appointed had valued the property and submitted Ext.C2 report with annexures. Appellant had remitted the requisite court fee for separate allotment of his share. Accordingly, plot No.4 in Ext.C1(a) plan was allotted to his share. It is not seen from the records that the appellant had raised any objection with regard to the availability of the commercial building for partition. He cannot be now heard to say that the building which is available in the plaint schedule property cannot be divided among the sharers. It has to be noticed that appellant is also a beneficiary.

Having regard to the entire facts and circumstances of the case, we are satisfied that no interference is warranted with the order passed by the court below. In our view, the court below has considered the relevant aspects of the case in a proper and legal manner. Partition has been effected in an equitable and just

manner. Therefore, we are not inclined to admit this appeal. The appeal fails. It is accordingly dismissed in-limine.

(M. Ramachandran, Judge.)

(A.K. Basheer, Judge.)

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